



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 29, 1993

Mr. William J. Delmore, III
General Counsel
Office of the District Attorney
201 Fannin, Suite 200
Houston, Texas 77002-1901

OR93-373

Dear Mr. Delmore:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19667.

The Harris County District Attorney's Office (the "district attorney") has received a request for a copy of certain videotape relating to the arrest of a person for the offense of driving while intoxicated ("DWI"). Specifically, the requestor seeks a copy of the videotape depicting the DWI testing of Ms. Ruth Ann Driggers. You have submitted the requested videotape to us for review and claim that it is excepted from required public disclosure by sections 3(a)(1), 3(a)(3), and 3(a)(8) of the Open Records Act.

Section 3(a)(1) excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You wish to withhold the videotape, claiming that its release would constitute an invasion of the defendant's right of privacy. The doctrine of common-law privacy protects information containing highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, provided the information is not of legitimate public concern. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Having examined the videotape, we conclude that it does not contain information that is intimate or embarrassing. Moreover, the videotape is of legitimate public concern. Accordingly, we conclude that the videotape may not be withheld under section 3(a)(1) in conjunction with common-law privacy doctrine. *See* Open Records Decision No. 478 (1987) (the fact that a person submits to an intoxilyzer test is of legitimate public concern).

You also claim that the requested information is excepted by section 3(a)(1) because it constitutes work product and is subject to the "law enforcement privilege" set forth in *Hobson v. Moore*, 734 S.W.2d 340 (Tex. 1987). This argument was rejected in

Open Records Letter No. 93-213 (1993). As we stated in that ruling, section 3(a)(1) does not encompass work product or discovery privileges. *See also* Open Records Decision No. 575 (1990). Such protection may exist under section 3(a)(3), if the situation meets the section 3(a)(3) requirements.¹

Section 3(a)(3) excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Section 3(a)(3) applies only when litigation in a specific matter is pending or reasonably anticipated and only to information clearly relevant to that litigation. Open Records Decision No. 551 (1990). Section 3(e) provides that for purposes of section 3(a)(3), "the state . . . is considered to be a party to litigation of a criminal nature until . . . the defendant has exhausted all appellate and postconviction remedies in state and federal court." V.T.C.S. art. 6252-17a, § 3(e); *see also* Open Records Decision Nos. 469 (1987); 433 (1986). Section 3(e), however, is inapplicable unless the governmental body has established that litigation in a specific matter is pending or reasonably anticipated and that the information clearly relates to that litigation. Open Records Decision No. 518 (1989) at 5.

You advise us that the defendant in the case at issue here entered a plea of no contest for the offense of driving while intoxicated and that the court subsequently assessed her punishment at confinement in jail for 180 days, probated for a period of two years, and payment of a \$300 fine. You have not, however, provided us with information indicating that the defendant has exhausted all of her appellate and postconviction remedies in state and federal court, nor have you provided us with any information demonstrating the pendency or reasonable likelihood of litigation. We therefore have no basis on which to conclude that the requested videotape relates to pending or anticipated litigation. Accordingly, the requested videotape may not be withheld from required public disclosure under section 3(a)(3) of the Open Records Act.

¹Please note that section 14(f) of the act, added by the 71st Legislature in 1989, chapter 1248, section 18 provides in part that "exceptions from disclosure under this Act do not create new privileges from discovery." Accordingly, the *Hobson* court's apparent use of section 3(a)(8) as a basis for the "law enforcement privilege" is no longer valid.

With respect to section 3(a)(8), you argue that this exception should apply to all material in a closed law enforcement file. You also dispute our use of a standard that permits you to withhold from a closed file only that information the release of which would "unduly interfere with law enforcement." In Open Records Letter No. 93-213, we reviewed the same argument and rejected it. Accordingly, we will apply the existing standard of undue interference with law enforcement. Since you do not claim that any undue interference with law enforcement will be caused by releasing the videotape, you have waived this argument. Accordingly, the requested videotape may not be withheld from required public disclosure under section 3(a)(8) of the Open Records Act.

Finally, we note that the videotape submitted to us for review depicts a peace officer. Section 3(a)(19) of the Open Records Act prohibits the public release of photographs depicting a peace officer. It excepts from required public disclosure:

photographs that depict a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer unless:

- (A) the officer is under indictment or charged with an offense by information; or
- (B) the officer is a party in a fire or police civil service hearing or a case in arbitration; or
- (C) the photograph is introduced as evidence in a judicial proceeding.

Open Records Decision No. 502 (1988), a copy of which is enclosed, held that section 3(a)(19) "protects from required disclosure all photographs of peace officers unless the circumstances in subsections (A), (B), and/or (C) of section 3(a)(19) occur or the peace officer gives written consent to release as provided in section 3(c)." Open Records Decision No. 502 (quoting from the summary). Section 3(c) provides that information excepted from disclosure by section 3(a)(19) may be released "only if the peace officer or security officer gives written consent to the disclosure."

We have viewed the videotape. It depicts a peace officer as defined by article 2.12, Code of Criminal Procedure. The peace officer depicted has not consented to release of the videotape pursuant to section 3(c) of the Open Records Act. We do not understand any of the situations described in subsections (A), (B), or (C) to be applicable here. However, we believe it to be practicable in this instance to release the videotape without also releasing information that depicts the peace officer. For example, a "blue

dot" or some other similar mechanism could be used to cover the peace officer or to delete the portion of each frame in which he appears. We conclude, therefore, that you must release the requested information, provided that the portion of each frame depicting the police officer is covered. Cf. Open Records Letter No. 92-700 (1992) (requiring governmental body to delete portions of photograph by airbrushing).

Because prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



James B. Pinson
Assistant Attorney General
Opinion Committee

JBP/GCK/jmn

Ref.: ID# 19667

Enclosures: Open Records Decision No. 502
video tape

cc: Mr. Donovan J. Carey
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